



**NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.**  
8001 BRADDOCK ROAD, SUITE 600, SPRINGFIELD, VIRGINIA 22160 • (703) 321-8510

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**JOHN MARTIN**

*Staff Attorney*

*Admitted TX only*

*web jrm@nrtw.org*

*fax (703)321-9319*

**Via Express Mail**

August 3, 2005

Lester A. Heltzer, Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, DC 20570-0001  
(202) 273-1067

Re: Firstline Transportation Security, Inc., Case No. 17-RC-12354

Dear Mr. Heltzer:

Enclosed for filing are the original and eight copies of an *amicus* brief submitted on behalf of the National Right to Work Legal Defense Foundation, Inc., in support of Firstline Transportation Security, Inc., in the above-captioned case. In a letter dated July 28, 2005, the Foundation requested permission to file this brief (copy attached).

Thank you for your attention to this matter, and please call me if you have any questions.

Sincerely,

John Martin

Enclosure

cc (U.S. Mail only): William G. Trumpeter  
Stephen P. Schuster  
Mark L. Heinen



NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.  
8001 BRADDOCK ROAD, SUITE 600, SPRINGFIELD, VIRGINIA 22160 • (703) 321-8510

JOHN MARTIN

Staff Attorney

Admitted TX only

web jrm@nrtw.org

fax (703)321-9319

July 28, 2005

Mr. Robert J. Battista  
Ms. Wilma B. Liebman  
Mr. Peter C. Schaumber  
National Labor Relations Board  
c/o Lester A. Heltzer  
1099 14<sup>th</sup> Street, N.W.  
Washington, DC 20570-0001

Re: Firstline Transportation Security, Inc., Case No. 17-RC-12354

Dear Members:

The National Right to Work Foundation requests permission to file an *amicus curiae* brief in support of Firstline Transportation Security, Inc., in the above-captioned case.

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their rights to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

The Foundation has represented numerous individuals before the National Labor Relations Board and in the courts including in such landmark cases as Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991); Communications Workers v. Beck, 487 U.S. 735 (1988); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Minnesota State Board v. Knight, 465 U.S. 271 (1984); Ellis v. Railway Clerks, 466 U.S. 435 (1984); and Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

The National Right to Work Legal Defense Foundation will argue on behalf of the private-company airport screeners who would be forced to be represented by and most likely pay fees to a labor union as a condition of employment. Because it is the employees that will be most affected by any decision in the above-captioned cases, the Foundation believes that it provides a unique perspective to the arguments surrounding this case. The Foundation will argue that forcing airport screeners to be subject to monopoly bargaining is especially inappropriate in the airport-screening context, because the Transportation Security Administration has decided, in the interest of national security, not to permit monopoly bargaining for TSA-employed airport screeners. Moreover, because TSA controls the pay range and all other terms and conditions of employment for Firstline's employees, there is little the

July 28, 2005

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union could bargain for, with the exception of a compulsory unionism clause forcing non-union members to pay fees to the union.

Because of the unique perspective that the National Right to Work Legal Defense Foundation will bring to this case, the Foundation respectfully requests permission of the Board to file an amicus brief in support of Firstline Transportation Security, Inc.'s request for review.

Sincerely,

A handwritten signature in black ink that reads "John Martin". The signature is written in a cursive, slightly slanted style.

John Martin

cc: William G. Trumpeter  
Stephen P. Schuster  
Mark L. Heinen

BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:	)	
	)	
FIRSTLINE TRANSPORTATION	)	
SECURITY, INC.,	)	
	)	
Employer,	)	
	)	Case No. 17-RC-12354
and	)	
	)	
INTERNATIONAL UNION, SECURITY,	)	
POLICE AND FIRE PROFESSIONALS	)	
OF AMERICA (SPFPA),	)	
	)	
Petitioner.	)	

***AMICUS CURIAE* IN SUPPORT OF FIRSTLINE TRANSPORTATION SECURITY,  
INC.'S PETITION TO REVERSE THE DECISION OF THE REGIONAL DIRECTOR**

John R. Martin  
National Right to Work Legal Defense Foundation, Inc.  
8001 Braddock Road, Suite 600  
Springfield, VA 22160  
(703) 321-8510  
Fax: (703) 321-9319  
jrm@nrtw.org

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## INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense and Education Foundation (“Foundation”) is a nonprofit, charitable organization that provides free legal assistance to individuals, who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

Attorneys provided by the Foundation have represented numerous individuals before the National Labor Relations Board (“NLRB” or “Board”) and in the courts, including representation in such landmark cases as Air Line Pilots Association v. Miller, 523 U.S. 866 (1998); Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991); Communications Workers of America v. Beck, 487 U.S. 735 (1988); Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); Ellis v. Railway Clerks, 466 U.S. 435 (1984); and Abood v. Detroit Board of Education, 431 U.S. 209 (1977). In hundreds of other cases throughout the country, the Foundation is aiding individuals who seek to limit their forced association with unions and their financial payments to those unions.

*Amicus* Foundation believes that any time individuals are forced to join, be represented by, or support a labor union, said compulsion impacts upon their constitutional rights. Compulsory unionism is particularly inappropriate for airport screeners, who are among the last lines of defense against terrorism. Safety is the paramount concern of the Transportation Security Administration (“TSA”), not union organizing and monopoly bargaining. Since TSA controls the terms and conditions of employment of private screeners, the only reason a union

would want to bargain with a private screening company is to impose a compulsory unionism requirement on non-union members, forcing them to pay union fees. In light of the above, the Foundation submits this brief to highlight the adverse impact that certifying labor unions as exclusive bargaining agents of airport screeners will have upon national security.

## **ARGUMENT**

### **INTRODUCTION**

After the September 11, 2001 attacks, Congress felt so strongly about airport and airline security that it created a federal agency – the Transportation Security Administration (“TSA”) – to be in charge of airport screening. All airport screeners must be TSA employees, with the exception of a pilot program operating in five airports where private companies provide the screeners.

The Board should decline to assert jurisdiction over the private screening company in this case because introducing monopoly bargaining to a private screening company whose employees are under the management and control of TSA would hinder national security – the paramount concern of Congress in creating TSA.

In the alternative, the Board should overrule Management Training Corp. (Teamsters Local 222), 317 N.L.R.B. 1355 (1995), and re-institute the governmental control test or the intimate connection test. The Board should find that the private screening company in this case is under governmental control and cannot engage in meaningful bargaining, and that the service the company provides to TSA is intimately connected with TSA’s operations. The Board should, in turn, decline jurisdiction under either the governmental control or the intimate connection test.

## **I. BACKGROUND**

### **A. Aviation and Transportation Security Act**

In November 2001, Congress passed the Aviation and Transportation Security Act (“ATSA”). This Act created the Transportation Security Administration within the Department of Transportation. See 49 U.S.C. § 114.<sup>1</sup> The head of TSA is the Under Secretary of Transportation for Security. The Under Secretary is “responsible for day-to-day Federal security screening operations for passenger air transportation and interstate air transportation”; is to “develop standards for the hiring and retention of security screening personnel”; is to “train and test security screening personnel”; and is “responsible for hiring and training personnel to provide security screening at all airports in the United States.” Id. § 114(e).

In addition to the screeners employed by TSA, Congress directed the Under Secretary to create a pilot program for screening personnel employed by private screening companies. See id. §§ 44919, 44920. The private screening personnel must meet all the requirements applicable to TSA-employed screeners. See id. § 44919(f). The compensation level of private screeners must at least equal that of TSA-employed screeners. Id. Federal Government supervisors must oversee all screening by private screeners. Id. § 44920(e).

### **B. TSA manages, supervises, and controls private screeners.**

The Under Secretary chose Kansas City International Airport (“MCI”) as one of the five

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<sup>1</sup> TSA was subsequently moved to the Department of Homeland Security (“DHS”). See 6 U.S.C. § 203. The Under Secretary of Transportation for Security would now be known as the Administrator of TSA. See id. § 234. This brief will refer to the head of TSA as the “Under Secretary.”

airports for the pilot program.<sup>2</sup> Firstline Transportation Security, Inc. (“Firstline”) was the screening company chosen to provide screeners to TSA at MCI.<sup>3</sup> TSA directs these screeners, and the screeners are subject to TSA’s policies and guidelines.<sup>4</sup> TSA must certify that each screener applicant meets TSA standards before the applicant is offered employment by TSA.<sup>5</sup>

Every newly hired screener goes through a training process administered by “TAIs” – trainers who are certified by TSA.<sup>6</sup> TSA training managers observe and oversee the training process.<sup>7</sup> If the new employee passes the training process, TSA certifies him or her.<sup>8</sup>

TSA managers control, supervise, and oversee private security screeners as the screeners perform their passenger and baggage screening functions.<sup>9</sup> TSA uses Firstline’s workforce at TSA’s discretion.<sup>10</sup>

TSA sets the pay range for Firstline’s employees.<sup>11</sup> TSA provides and repairs the

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<sup>2</sup> Decision and Direction of Election at 4.

<sup>3</sup> Employer’s Request for Review of the Regional Director’s Decision at 3.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id. at 3-4.

<sup>10</sup> Id. at 3.

<sup>11</sup> Id. at 4.

equipment used by Firstline's employees in passenger and baggage handling.<sup>12</sup>

**C. The Under Secretary denied monopoly-bargaining power over airport screeners.**

On January 8, 2003, the Under Secretary issued a memorandum denying monopoly-bargaining power over airport screeners. The Under Secretary determined that security screeners, "in light of their critical national security responsibilities, shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization." When the Under Secretary issued this directive, there were approximately 55,600 screeners employed by TSA serving over 400 U.S. airports.<sup>13</sup> The Under Secretary based his authority on 49 U.S.C. § 44935 Note, which granted him authority to "employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions."

The Federal Labor Relations Authority upheld the Under Secretary's directive, concluding that Section 44935 Note "leaves unfettered discretion to the Under Secretary to determine the terms and conditions of employment for screener personnel in the TSA." United States Dep't of Homeland Sec. (Am. Fed'n of Gov't Employees), 59 F.L.R.A. 423, \*13 (2003).

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<sup>12</sup> Id. at 4.

<sup>13</sup> Transportation Security Administration, Screener Rightsizing Fact Sheet (Sept. 29, 2003), available at <http://www.tsa.gov/public/display?theme=44&content=711> (last visited July 22, 2005). TSA downsized to approximately 48,000 screeners on September 25, 2003. Id.

**II. THE BOARD SHOULD REFRAIN FROM EXERCISING JURISDICTION OVER PRIVATELY-EMPLOYED AIRPORT SECURITY SCREENERS, BECAUSE EXERCISING JURISDICTION WOULD HAVE AN ADVERSE IMPACT ON NATIONAL SECURITY.**

**A. The Board has discretion whether to exercise jurisdiction over a case.**

The Supreme Court has written:

Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.

NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 684 (1951); see also Pikeville United Methodist Hosp. v. United Steelworkers, 109 F.3d 1146, 1151 (6<sup>th</sup> Cir. 1997) (“It is true that in some instances, the NLRB may, in its own discretion, choose not to exercise the jurisdiction that it may otherwise invoke.”).<sup>14</sup>

**B. Exercising jurisdiction will damage national security.**

TSA’s mission is “to prevent terrorist attacks within the United States” and “reduce the vulnerability of the United States to terrorism.” United States Dep’t of Homeland Sec. (Am. Fed’n of Gov’t Employees), 59 F.L.R.A. 423, \*2 (2003). The legislative history of ATSA makes

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<sup>14</sup> One court explained:

[I]t is clear that the Board has the broadest jurisdictional authority possible under the Constitution, and that it may, but need not, decline jurisdiction in certain cases in exercise of its discretion. Thus, the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board’s sound discretion. In the absence of extraordinary circumstances, or abuses of that discretion, such a discriminatory exercise of jurisdictional discretion by the Board is not subject to review by the Federal courts.

San Juan Racing Ass’n v. Lab. Relations Bd., 532 F. Supp. 51, 53 (D.P.R.1982) (citations omitted).

clear that national security was the reason Congress created the Transportation Security Administration.<sup>15</sup> The Under Secretary determined that airport screeners should not be subject to monopoly bargaining “in light of their critical national security responsibilities.”

The “national security responsibilities” for TSA-employed screeners and private screeners are the same. The statutory requirements for private screeners are exactly the same as for screeners employed by TSA. See 49 U.S.C. § 44919(f) (employees must “meet all the requirements” applicable to TSA screeners). Private screening companies must “provide compensation and other benefits to [employees] that are not less than the level of compensation and benefits provided to [screeners employed by TSA].” Id. It would be just as damaging to national security to permit private screeners to be subject to monopoly bargaining as it would be for TSA- employed screeners.<sup>16</sup> It makes no sense for the 48,000 TSA-employed screeners to be exempt from monopoly bargaining, while the Board grants to the Union monopoly-bargaining power over private screeners at the five airports in the pilot program. The Board should refrain from exercising jurisdiction in the interest of national security. Cf. ITT Indus., Inc. (UAW), 341 N.L.R.B. No. 118, \*9 (2004) (Battista, Chairman, dissenting) (urging the Board to balance rights

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<sup>15</sup> See Alex C. Hallett, Note, An Argument for the Denial of Collective-Bargaining Rights of Federal Airport Security Screeners, 72 Geo. Wash. L. Rev. 834, 852-54 (2004) (discussing legislative history of ATSA). Hallett writes:

The pervasive feeling of Congress at the time of passage was that national security was the paramount concern. The national-security function of the airport screeners under the new TSA was compared to the functions of the Capitol Police, the Secret Service, and the FBI.

Id. at 852.

<sup>16</sup> See discussion infra Part II.C (regarding problems of public-sector strikes).

under the Act with legitimate “national security” concerns).

**C. The risk of a strike**

**1. Unions engage in strikes even when strikes are forbidden by law.**

ATSA does not to permit striking by airport screeners. 49 U.S.C. § 44935(I). Making strikes illegal, however, does not eliminate the danger that a union will strike. Strikes in the public sector, even when they are illegal, are commonplace.

For example, during the 1993-94 school year, 42 teacher strikes kept nearly 215,000 school children in the United States out of class.<sup>17</sup> Teacher strikes were illegal in over half the states where they occurred, but all occurred in states that have monopoly bargaining for teachers.<sup>18</sup> As Albert Shanker, late president of the American Federation of Teachers union, freely admitted: “[A] strike in the public sector is not economic – it is political . . . . One of the greatest reasons for the effectiveness of the public employees’ strike is the fact that it is illegal.”<sup>19</sup> Mr. Shanker knew that unions and union officials are seldom held to account for ordering strikes and work slow-downs, or threatening such actions to intimidate elected officials and taxpayers.

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<sup>17</sup> Teacher Strikes 1993-1994: A Survey of Activity, Gov’t Union Critique, July 29, 1994, at 1-3.

<sup>18</sup> State Public Sector Bargaining Statutes, Gov’t Union Critique, Aug. 13, 1993, at 5-7.

<sup>19</sup> Albert L. Shanker, Why teachers need the right to strike, Monthly Lab. Rev., Vol. 96, No. 9, at 50 (Sept. 1973).

## 2. Public-sector strikes endanger vital public services.

Police union militants in New York City<sup>20</sup>; Prince George's County, Maryland<sup>21</sup>; Wilmington, Delaware<sup>22</sup>; and Pontiac, Michigan,<sup>23</sup> to name but a few, have in recent years threatened or carried out so-called "blue flu" job actions, potentially endangering public safety, as a collective-bargaining tool.

The Baltimore police strike of 1974 led to widespread looting, shooting, and rock-throwing.<sup>24</sup> During the Kansas City fire fighters' strike of 1975, strikers set up picket lines around burning buildings.<sup>25</sup>

Then-San Francisco Mayor Joseph Alioto's home was pipe-bombed hours after he warned on television that striking police officers would be fired if they did not return to work.<sup>26</sup> The bomb shattered windows and seriously damaged the front door and porch pedestals.<sup>27</sup>

Striking fire fighters in Dayton, Ohio, sat idly by while fires destroyed up to twenty-nine

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<sup>20</sup> Dan Janison, NYPD Adds to Ranks, Newsday, Aug. 19, 2004, at A3.

<sup>21</sup> Jamie Stockwell, 'Blue Flu' Could Hit Prince George's, Wash. Post, Aug. 7, 2001.

<sup>22</sup> Press Release, Office of Mayor James M. Baker, "Blue Flu" Update (July 13, 2004), available at [http://www.ci.wilmington.de.us/mayorpress/2004/0713\\_bluefluupdate.htm](http://www.ci.wilmington.de.us/mayorpress/2004/0713_bluefluupdate.htm).

<sup>23</sup> Korie Wilkins, Blue flu bug bites Pontiac, Daily Oakland Press (July 16, 2005), available at [http://www.theoaklandpress.com/stories/071605/loc\\_20050716003.shtml](http://www.theoaklandpress.com/stories/071605/loc_20050716003.shtml).

<sup>24</sup> Ralph de Toledano, The Municipal Doomsday Machine 38 (1975).

<sup>25</sup> Id. at 53.

<sup>26</sup> Randolph H. Boehm & Dan C. Heldman, Public Employees, Unions, and the Erosion of Civic Trust 151 (1982).

<sup>27</sup> Id.

(29) buildings throughout the city.<sup>28</sup> Thirty (30) families were left homeless.<sup>29</sup>

During a strike in Kansas City, strikers vandalized fire fighting equipment. Fire extinguishers were filled with flammable liquid, oxygen tanks were emptied, and the fuel tanks of trucks were fouled with water.<sup>30</sup>

During a 23-day strike by Chicago fire fighters and paramedics, more than 20 people died in fires<sup>31</sup> – an extraordinary number for a relatively short period. In one fire alone, three children and two adults died as a fire station near their home remained unmanned.<sup>32</sup>

### **3. A strike by a private-screeners union would be especially harmful.**

A strike by a private-screeners union would, at a minimum, cause a major disruption to airlines and travelers. At worst, a strike by a private-screeners union could threaten national security. The government would be faced with a terrible choice: (1) reduce air travel, and therefore economic activity, until new screeners could be trained and placed; or, (2) reduce the efficacy of screening procedures and thereby increase the chance of terrorism.

#### **D. The risk of a terrorist-controlled union**

In the 1930s, 1940s, and 1950s, many unions in the United States were infiltrated, controlled, or even headed by members of the Communist Party. See, e.g., American

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<sup>28</sup> Firemen in Ohio Wrong, Omaha World-Herald, Aug. 14, 1977.

<sup>29</sup> Id.

<sup>30</sup> Arson, Sabotage Burden Makeshift Fire Crews, Kansas City Star, Oct. 4, 1975.

<sup>31</sup> Judge Lowers Union Fines – Except One, San Diego Daily Transcript, Mar.17, 1980.

<sup>32</sup> Nathaniel Sheppard, Jr., Fires Kill 7 persons in Chicago, N.Y. Times, Mar. 6, 1980, at 16.

Communication Ass'n, C.I.O. v. Douds, 339 U.S. 382, 388-89 (1950) (summarizing congressional findings of Communist control of labor unions).<sup>33</sup> A congressional subcommittee that included then-Congressman John F. Kennedy received testimony that “‘Communists had infiltrated into the ranks of labor unions and that their activities constitute a grave menace to the industrial peace of the United States. . . . [T]hey ultimately seek to destroy our capitalistic system and to overthrow our form of government by force and violence. To this end they encourage sit-down and slow-down strikes, mass picketing, goon squads, and violence.’”<sup>34</sup> The most alarming example of union domination by the Communist Party was the strike in 1941 by United Auto Workers Local 248 at the Allis-Chalmers Manufacturing Company in Milwaukee.<sup>35</sup> The

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<sup>33</sup> For example, in this era Communists “managed to infiltrate the highest command posts of the CIO. Howard Kimeldorf, Reds or Rackets? 9 (1988). Communists played a “big role” in the United Auto Workers. Bert Cochran, Labor and Communism 108 (1977). In the “most momentous single strike in American labor history” – the 1936 nationwide strike against General Motors and its suppliers – “Communists were prominent in the conduct of the strike.” Id. at 119-22. During World War II, Communists retained control of eighteen international unions affiliated with the CIO, including the United Electrical Workers (UE), Mine Mill, the two maritime unions, the New York-based transport workers, and the fur and leather union. Id. at 208. In fact, Communists controlled the UE until the 1960s. Id. at 295-96. Between March and November 1941, there were nine Communist-led-strike disputes certified to the National Defense Mediation Board. Id. at 165. And there were eight Communist-threatened-strike disputes certified to the Board during the same time period. Id. at 166. The West Coast’s International Longshoremen’s and Warehousemen’s Union (ILWU) was a strong bastion of Communist unionism. Kimeldorf, supra at 5. The ILWU was “‘one of the great successes of the Communist Party establishing a native working-class base . . . approximat[ing] the Leninist image.’” Id. (citation omitted).

<sup>34</sup> Irving G. McCann, Why the Taft-Hartley Law? 114 (1950) (quoting the subcommittee report).

<sup>35</sup> “Local 248 of the UAW, which conducted the Allis-Chalmers strike, was Communist-oriented from its early inception to 1947, and a dominant force in both the Milwaukee and Wisconsin CIO. It was, therefore, a major Communist operation whose influence radiated out well beyond its immediate confines.” Cochran, supra note 33, at 166. In another important strike from 1941 – at North American Aviation in Los Angeles – “Communists dominated the leadership” of the UAW local. Id. at 177. The strike did not end until President Roosevelt ordered government

Supreme Court wrote: “Congress heard testimony that the strike had been called solely in obedience to Party orders for the purpose of starting the ‘snowballing of strikes’ in defense plants.” Doubs, 339 U.S. at 388. Congress responded to these findings by including Section 9(h) in the Taft-Hartley Act. Section 9(h), which was later repealed, required each union official to file an affidavit with the Board declaring that he was not a Communist and did not seek the violent or illegal overthrow of the United States government. See id. at 382 (upholding Section 9(h) against constitutional challenge).

If a union is granted exclusive representation of private-airport screeners, there is a risk that the union hierarchy will be infiltrated by a terrorist agent or that the union will be controlled by someone working with terrorists.<sup>36</sup> The terrorist could then use his influence with the union to make it easier for a terrorist colleague to board a plane or to get a bomb through baggage screening. Or the terrorist could more indirectly weaken national security, by organizing a strike or work slow-down. The Board should avoid this national-security risk by declining jurisdiction over this case.

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seizure of the plant, and 2,500 Army troops “moved in with fixed bayonets to disperse the picket lines and open the plant.” Id. at 179.

<sup>36</sup> The federal government is concerned about Islamic extremists penetrating American institutions. For example, Senator Kyl expressed concern that “there have been an increasing number of instances in which Wahhabists have successfully penetrated key U.S. institutions, such as the military and our prison system.” Terrorist Recruitment and Infiltration in the United States: Prisons and Military as an Operational Base Before the Senate Subcommittee on Terrorism, Technology, and Homeland Security, 109<sup>th</sup> Cong. (2003) (statement of Sen. John Kyl, Subcommittee Chairman), 2003 WL 22333480.

**III. IN THE ALTERNATIVE, THE BOARD SHOULD OVERRULE  
MANAGEMENT TRAINING CORP. AND RE-INSTITUTE THE  
GOVERNMENT CONTROL TEST OR THE INTIMATE CONNECTION  
TEST.**

Section 2(2) of the Act exempts from Board jurisdiction “the United States or any wholly owned Government corporation, . . . or any State or political subdivision thereof.” 29 U.S.C. § 152(2). Historically, the Board declined jurisdiction over governmental contractors if the government had effective control over the terms and conditions of employment of the contractor’s employees.

Prior to 1979, the Board used the intimate connection test when deciding whether to assert jurisdiction over private employers who had contracted with exempt governmental entities. See National Transp. Servs., Inc. (Truck Drivers & Helpers Local Union 728), 240 N.L.R.B. 565, 565-66 (1979) (discussing and overruling intimate connection test). The intimate connection test had two prongs. First, does the “exempt employer exercise[] substantial control over the services and labor relations of the nonexempt contractor, so that the latter is left without sufficient autonomy over working conditions to enable it to bargain efficaciously with the union”? Rural Fire Prot. Co., 216 N.L.R.B. 584, 586 (1975). If the answer was “yes,” the Board would decline jurisdiction. If the answer was “no,” the Board would examine “the relationship of the services performed to the exempted functions of the institution to whom they were provided.” Id. If the contractor provided services to the governmental employer which related directly to the governmental purpose, the Board would decline to assert jurisdiction. Id.

In 1979, the Board abandoned the intimate connection test in favor of the governmental control test. See National Transp. Servs., Inc., 240 N.L.R.B. 565 (1979). The Board concluded

that the first prong of the intimate connection test – “whether the employer would be able to bargain effectively about the terms and conditions of employment of its employees – is by itself the appropriate standard for determining whether to assert jurisdiction.” Id. at 565. The Board criticized “intimate connection” as too vague to be workable. Id. at 566.

The Board refined and reaffirmed the governmental control test in Res-Care, Inc., 280 N.L.R.B. 670 (1986). The Board distinguished between a “core group” of bargaining subjects, which is limited to “wages and fringe benefits,” and other bargaining subjects, such as hiring, firing, promotions, demotions, transfers, and grievances. Id. at 673-74. If the contractor does not have final say over wages and fringe benefits, then meaningful collective bargaining by the contractor is not possible, and the Board will decline to exercise jurisdiction. Id. at 674.

The Board subsequently overruled the governmental control test in Management Training Corp. (Teamsters Local 222), 317 N.L.R.B. 1355 (1995). The Board would now assert jurisdiction over any contractor that “meets the definition of ‘employer’ under Section 2(2) of the Act . . . and meets the applicable monetary jurisdictional standards.” Id. at 1358. Whether the contractor could engage in meaningful bargaining with its employees was no longer a factor the Board would consider. Id. The Board explained:

The Employer in question must, by hypothesis, control some matters relating to the employment relationship, or else it would not be an employer under the Act. In our view, it is for the parties to determine whether bargaining is possible with respect to other matters and, in the final analysis, employee voters will decide for themselves whether they wish to engage in collective bargaining under those circumstances.

Id.

The present case amply demonstrates why the Board should overrule Management Training Corp. and re-institute the governmental control test. TSA controls nearly every term

and condition of employment for Firstline's employees. TSA sets the pay range for Firstline employees.<sup>37</sup> TSA supervises, manages, and oversees every aspect of the employee's working day.<sup>38</sup> TSA provides and repairs the equipment used by Firstline's employees in passenger and baggage handling.<sup>39</sup> TSA must approve any applicant before Firstline may hire the applicant as a screener.<sup>40</sup> It is clear that Firstline cannot engage in meaningful collective bargaining with the union, and that TSA controls the private screeners' terms and conditions of employment. It is hard to imagine what terms Firstline and the union would negotiate, except that the union would demand and in all likelihood win a compulsory unionism clause, forcing non-union members to pay union fees. Because it makes little sense to certify a union as exclusive bargaining agent when there is nothing meaningful over which to bargain, the Board should overrule Management Training Corp. and decline to exercise jurisdiction over this case.

It is also clear that the private screeners provide a service that is intimately connected with TSA's purpose. TSA's purpose is to screen airport passengers and baggage, and private screeners do the same job as TSA-employed screeners. Private airport screeners are analogous to the private fire fighters in Rural Fire Protection Co., 216 N.L.R.B. 584 (1975), in which the Board declined to assert jurisdiction. The Board wrote: "[I]t plainly appears that the Employer's firefighting services furnished to the city of Scottsdale, utilizing fire stations and major

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<sup>37</sup> Employer's Request for Review of the Regional Director's Decision at 4; see also 49 U.S.C. § 44919(f) (employer must provide compensation and other benefits equal to that of TSA-employed screeners).

<sup>38</sup> Employer's Request for Review of the Regional Director's Decision at 3-4.

<sup>39</sup> Id. at 4.

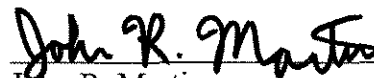
<sup>40</sup> Id. at 3.

firefighting equipment owned and maintained by the city, are intimately related to Scottsdale's municipal purposes." Id. at 586. The Board should decline to exercise jurisdiction over a private screening company whose services are so intimately connected with an exempt entity. Moreover, the Board should be especially hesitant to assert jurisdiction over a contractor when that contractor provides the same service as the contracting federal agency whose mission is to protect national security.

### CONCLUSION

For the above-stated reasons, the Board should deny certification of the union as the exclusive bargaining agent in this case. The Board should decline to exercise jurisdiction because doing so would adversely affect national security. In the alternative, the Board should overrule Management Training Corp. and decline jurisdiction under the governmental control or intimate connection test.

Respectfully submitted,



John R. Martin

National Right to Work Legal Defense  
Foundation, Inc.

8001 Braddock Road, Suite 600

Springfield, VA 22160

(703) 321-8510

Fax: (703) 321-9319

Attorney for *Amicus Curiae*

National Right to Work Legal Defense  
Foundation, Inc.

## CERTIFICATE OF SERVICE

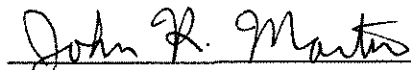
I hereby certify that a true and correct copy of the foregoing was deposited with the United States mail, postage pre-paid, addressed to:

William G. Trumpeter  
Miller & Martin PLLC  
832 Georgia Avenue  
Suite 1000, Volunteer Building  
Chattanooga, TN 37402-2289

Stephen P. Schuster  
Constangy, Brooks & Smith, LLC  
2600 Grand Boulevard, Suite 300  
Kansas City, MO 64108

Mark L. Heinen  
Gregory, Moore, Jeakle, Heinen & Brooks, P.C.  
65 Cadillac Square, Suite 3727  
Detroit, MI 48226-2993

August 3<sup>rd</sup>, 2005

  
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John R. Martin